IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 579 OF 2006
WITH
COMPANY APPLICATION NO. 745 OF 2006

In the matter of Scheme of Arrangement between Elof Hansson (India) Private Limited and its equity and its equity shareholders.

Elof Hansson (India) Private Limited, Mumbai. ... Petitioner.

Gaurav Joshi i/b. Prem J. Ranga for the petitioner.

C.J.Joy with Ms.Madhuri Gaikwad i/b. Pankaj Kapoor for the Regional Director.

CORAM: V.C.DAGA, J.

DATED: 2nd March 2007.

P.C.:

. Heard learned counsel for the rival parties.

. Perused petition and the scheme of arrangement.

2. The Regional Director, Western Region, Ministry of Company Affairs has filed affidavit to oppose the Scheme of Arrangement between M/s.Elof Hanson (India) Private Limited and its equity shareholders. He has raised three objections to the

acceptance of the said scheme, which read as under:

> (i) that there is no specific provision in the Companies Act, 1956 to pay back an amount of shares out of balance outstanding at the credit of Reserves and Surplus Account of the Company. The petitioner company is seeking sanction of this Court under section 391 to 394 of the Companies Act which are not applicable to the instant petition.
>
> (ii) that the petitioner company may be directed to file form No.23 with the Registrar of Companies, Mumbai in respect of special resolution passed on 18th August, 2006; and
>
> (iii) that No Objection Certificates from unsecured creditors are not produced.

3. The learned counsel appearing for the Regional Director submits that there is no provision under the Companies Act, 1956 to pay back the amount of share out of balance outstanding at the credit of Reserves and Surplus Account of the Company. He, therefore, submits that the provisions of sections 391 to 394 of the Companies Act shall not be applicable as such the Scheme of Arrangement cannot be sanctioned. He further submits that the petitioner be directed to file Form No.23 with the Registrar of Companies, Mumbai under section 101 of the Companies Act in respect of special resolution passed on 18th August, 2006 and also No Objection Certificates from the unsecured creditors.

4. The learned counsel for the petitioner-Company submits that for exercising right of bye back, the Company can utilise its accumulated profit to pay

back to the shareholders the whole or part of the paid-up amount of shares. He placed reliance on the judgment of the Apex Court in the case of **Punjab Distilling Industries Ltd. v. Commissioner of Income-Tax, Punjab**, 1965 (35) Comp.Cases 541; wherein the Apex Court observed as under:

> "..... Accumulated profits of a company may be utilised in the following 3 ways: (I) for increasing the capital stock; (2) for distributing the same among the shareholders by way of dividends; and (3) for reducing the capital. Ordinarily, a company reduces the capital when there is loss or depreciation of assets; in that event there is no question of distribution of profits to the shareholders but the shares are only devaluated. <u>But a company may, on the pretext of reducing its capital, utilise its accumulated profits to pay back to the shareholders the whole or part of the paid up amounts on the shares.</u> A shareholder though in form gets back the whole or a part of the capital contributed by him, in effect he gets a share of the accumulated profits which, if a straightforward course was followed, he should have received as dividend. This is a division of profits under the guise of division of capital; a distribution of profits under the colour of reduction of capital....."
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> (Emphasis supplied)

In view of the aforesaid judgment of the Supreme Court, the first objection raised by learned counsel for the Regional Director has no substance.

5. So far as the second objection is concerned, learned counsel for the petitioner submits that the Company will have no objection to file Form No.23 with the Registrar of Companies. He undertakes on behalf of the Company to file the said form within two weeks from today. The oral undertaking given by learned counsel for the petitioner is accepted and taken on record. However, petitioner- Company is directed to file affidavit of undertaking to comply with the second objection raised by the Regional Director referred to hereinabove.

6. So far as No Objection to the arrangement from the unsecured creditors is concerned, Mr.Marcellino Silveira has filed affidavit on behalf of the Company and produced some consent and no objection letters from the unsecured creditors, details of which are furnished along with the said affidavit dated 27th February, 2007; wherein the statement is made that the petitioner- Company has 16 unsecured creditors, whose liability on the Company is in the sum of Rs.9,49,935.50. Consent of 2 unsecured creditors consenting to the subject Scheme of Arrangement, whose value in terms of Company’s liability is to the tune of Rs.3,98,813/- have been filed on record. Consent

letters of one unsecured creditor having liability to the extent of Rs.1,980/- and other amounting to Rs.1,000/- consenting to the Scheme of Arrangement are filed on record.

7. In respect of others, a statement is made that they mostly pertain to the payments on account of salary and other miscellaneous items. In that view of the matter, considering filing of consent letters from majority of the unsecured creditors, non-filing of the consent letters of the remaining unsecured creditors is of no consequence. The Scheme of Arrangement, thus, deserves to be approved.

8. In the result, petition is made absolute in terms of prayer clause (a) with no order as to costs.

(V.C.DAGA, J.)